**WAH BEE CONSTRUCTION ENGINEERING**

**v.**

**PEMBENAAN FUNGSI BAIK SDN. BHD.**

COURT OF APPEAL, KUALA LUMPUR
TUAN SRI GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATUK MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: P-02-237-94]
19 APRIL 1996

***CIVIL PROCEDURE:*** *Discontinuance – Application to discontinue action – Requirements – Whether notice of discontinuance to be co-signed by the respondent – Power of Court to make orders - Real purport of discontinuance disputed by parties – Whether trial Judge to determine whether parties were ad idem – Failure to address issue of ad idem – Whether a misdirection – Rules of High Court 1980 O. 21 rr. 2(1), 3(1).*

***CIVIL PROCEDURE:*** *Discontinuance – Filing of notice – Notice of discontinuance filed more than 14 days after delivery of defence by respondent – Effect – Whether applicant to satisfy Court that action ought to be discontinued – Rules of High Court 1980 O. 21 rr. 2(1), 3(1).*

In 1991 the appellant entered into an agreement with the respondent in which it agreed to construct 260 units of houses for the latter. In 1993, upon default by the respondent to pay on three certificates of completion, the appellant commenced proceedings in the High Court claiming from the respondent a sum of RM285,474.30. The claim was filed notwithstanding that there was provision in the agreement for arbitration. Be that as it may, on 12 April 1993, the respondent delivered its defence and hence took a step in the action.

The parties subsequently decided to go to arbitration and so, on 1 October 1993, they appeared before a PAM appointed arbitrator and obtained the necessary directions. Following the arbitration proceedings, the appellant took steps to discontinue the suit in Court, and so, on 28 October 1993, it filed the relevant notice of discontinuance, apparently after having obtained a verbal consent from the respondent. The facts showed, however, that when giving the said consent, the respondent was under the impression that the discontinuance of the action amounted to an abandonment by the appellant of its claim in Court. This, however, was just not to be, as in its statement of case to the arbitrator, the appellant also cited the claim which formed the subject matter of the suit in Court, believing, apparently, that the purpose of the discontinuance was to refer all disputes to arbitration, including the action in Court. This being the circumstance, on 1 November 1993, the respondent formally withdrew its consent. As it was, in the contemporaneous correspondence between the parties, there was nothing to suggest that there

was an agreement between them to refer all disputes, including the subject matter of the action, to arbitration.

On 11 April 1994, the appellant filed a notice of motion in the High Court wherein it applied for a declaration that the suit, by reason of the respondent's consent, was properly discontinued, or alternatively, for leave to discontinue it. The learned Judge ruled that the suit had not been properly discontinued and hence dismissed the application (including the application for leave). In so ruling, however, the learned Judge, rather deliberately, had not examined the contemporaneous correspondence, or dwelt upon the question of whether or not the respondent was under a genuine mistake as to the real purport of the discontinuance. Rather, the application was decided solely upon the basis that there was a failure by the appellant to observe the formal requirements of a notice of discontinuance, including the necessity to have the notice co-signed by the respondent.

In this appeal the primary issues that arose were (i) whether the appellant's suit had been properly discontinued (ii) whether discretion ought to be exercised in the appellant's favour and leave granted to discontinue and (iii) whether the trial Judge adopted a correct approach when deciding the issues before him.

**Held:**

**Per Gopal Sri Ram JCA (delivering the judgment of the Court):**

**[1]** The appellant had acted in breach of the arbitration agreement when it instituted the suit and the respondent accepted the breach by delivering its defence. In the result, by the application of well-established principles governing the law of contract, the arbitration agreement in its original form came to an end.

**[2]** There was operating upon the minds of the respondent a genuine mistake as to the real purport of the discontinuance. It was thus quite impossible to assert with any confidence that the parties were *ad idem* upon the critical issue, ie, the precise nature of what was to be referred to the arbitrator. Consequently the appellant's contention that the action had been discontinued with the respondent's consent is unsustainable.

**[3]** The approach adopted by the trial Judge was clearly wrong. The fact pattern as was presented before him required him to carry out an objective assessment of the contemporaneous correspondence that was placed before the Court for the purpose of ascertaining whether the parties were *ad idem* upon the critical issue as to the nature and extent of the dispute that was being referred to arbitration (which he failed to do). The learned Judge was also wrong when he completely overlooked the point that, if, as contended by the appellant, there was genuine consent by the respondent to the action being continued, the omission by its solicitors to co-sign the relevant notice was completely irrelevant.

**[4]** However, although the learned Judge misdirected himself on the adjectival law that governed the formal requirements for the discontinuance of an action, his ultimate decision was correct. This Court therefore agrees with his conclusion that the action had not been properly discontinued, but on different ground, namely, that the contemporaneous correspondence did not disclose an agreement between the parties as to whether the reference to the arbitrator included the action in Court.

**[5]** At the date the appellant filed its notice of discontinuance, more than 14 days had lapsed since the respondent's delivery of its defence to the action. Bearing in mind O. 21 rr. 2(1) and 3(1), therefore, the appellant had to satisfy the Court that the action ought to be continued.

**[6]** The appellant had singularly failed to demonstrate any error on the part of the Judge when he came to exercise his discretion. On the contrary, the learned Judge, when deciding whether to permit discontinuance, had applied his mind to all the relevant facts and circumstances of the case and had not made any error of principle when making the decision. There being no miscarriage of justice occasioned to the appellant, the appeal ought to be dismissed.

*[Appeal dismissed]*

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Pemberhentian – Permohonan untuk memberhentikan tindakan – Syarat-syarat – Samada notis perberhentian hendaklah ditandatangani bersama oleh responden – Kuasa Mahkamah untuk membuat perintah – Tujuan sebenar pemberhentian dipertikaikan oleh pihak-pihak – Samada Hakim perbicaraan harus menentukan bahawa pihak-pihak adalah ad idem – Kegagalan untuk menimbang isu ad idem – Samada suatu salah arahan – Kaedah-kaedah Mahkamah Tinggi 1980 A. 21 kk. 2(1), 3(1).*

***PROSEDUR SIVIL:** Pemberhentian – Pemfailan notis – Notis pemberhentian difailkan lebih daripada 14 hari selepas penyampaian pembelaan oleh responden – Kesan – Samada pemohon harus menyakinkan Mahkamah bahawa tindakan seharusnya diberhentikan – Kaedah-kaedah Mahkamah Tinggi 1980 A. 21 kk. 2(1), 3(1).*

Pada 1991 perayu telah memasuki satu perjanjian dengan responden di mana ia bersetuju untuk membina 260 unit rumah bagi pihak yang terkemudian. Dalam tahun 1993, atas kemungkiran oleh responden untuk membayar bagi tiga perakuan penyiapan, perayu telah memulakan prosiding di Mahkamah Tinggi menuntut daripada responden jumlah sebanyak RM285,474.30. Tuntutan tersebut telah difailkan tanpa menghiraukan bahwa terdapatnya peruntukan dalam perjanjian tersebut untuk timbangtara. Biarpun keadaannya sedemikian, pada

12 April 1993, responden telah menyampaikan pembelaannya dan dengan itu telah mengambil langkah dalam tindakan tersebut.

Pihak-pihak tersebut berikutan itu membuat keputusan untuk pergi kepada timbangtara dan dengan itu, pada 1 Oktober 1993, mereka telah hadir di hadapan seorang penimbangtara yang dilantik oleh PAM dan telah mendapatkan arahan-arahan yang perlu. Berikutan dengan prosiding-prosiding timbangtara tersebut, perayu telah mengambil langkah untuk memberhentikan guaman dalam Mahkamah, dan oleh itu, pada 28 Oktober 1993, ianya telah memfailkan notis pemberhentian yang relevan, selepas mendapatkan persetujuan lisan daripada responden. Fakta menunjukkan bahawa ketika memberi persetujuan tersebut, responden beranggapan bahawa pemberhentian tindakan tersebut membawa kepada suatu peninggalan tuntutan yang dibuat oleh perayu dalam Mahkamah.

Ini, namun begitu, bukanlah sedemikian, kerana dalam pernyataan kes yang dibuatnya kepada penimbangtara, perayu telah juga menyebut tuntutan yang menjadi hal perkara guaman dalam Mahkamah, mempercayai bahawa tujuan pemberhentian tersebut adalah untuk merujuk kesemua pertikaian kepada timbangtara, termasuk tindakan dalam Mahkamah. Dalam keadaan yang sedemikian, pada 1 November 1993, responden telah secara rasmi menarikbalik persetujuan yang diberinya. Sebagaimana keadaanya, dalam perutusan surat pada waktu yang sama antara pihak-pihak tersebut, tidak terdapat apa-apa yang menyarankan bahawa perjanjian antara mereka untuk merujuk kesemua pertikaian termasuk hal perkara tersebut, kepada timbangtara.

Pada 11 April 1994, perayu telah memfailkan satu notis usul dalam Mahkamah Tinggi di mana ianya telah memohon untuk mendapatkan satu pengisytiharan bahawa guaman yang berkenaan, disebabkan oleh persetujuan atau kebenaran yang diberikan oleh responden, telah diberhentikan secara betul, atau secara alternatifnya, bagi mendapatkan kebenaran untuk memberhentikannya. Hakim yang bijaksana telah memutuskan bahawa guaman tersebut telah tidak diberhentikan dengan betul dan dengan itu menolak permohonan perayu (termasuk permohonan untuk kebenaran). Dalam memutuskan sedemikian, Hakim yang bijaksana, dengan sengaja telah tidak memeriksa perutusan surat semasa di atas, atau menimbang persoalan samada ataupun tidak, responden benar-benar khilaf berhubung dengan tujuan sebenar pemberhentian tersebut. Permohonan tersebut telah diputuskan semata-mata atas dasar bahawa telah berlaku kegagalan oleh perayu untuk mematuhi syarat-syarat formal notis pemberhentian, termasuk perlunya notis tersebut ditandatangani bersama oleh responden.

Dalam rayuan ini isu utama yang berbangkit adalah (i) samada guaman perayu telah diberhentikan dengan betul (ii) samada budibicara seharusnya dilaksanakan dengan memihak kepada perayu dan kebenaran diberikan untuk pemberhentian dan (iii) samada Hakim perbicaraan telah memakai pendekatan yang betul ketika memutuskan isu-isu yang terdapat dihadapannya.

**Diputuskan:**

**Oleh Gopal Sri ram HMR (menyampaikan penghakiman Mahkamah):**

**[1]** Perayu telah bertindak dalam kemungkiran perjanjian timbangtara bilamana ianya memulakan guaman tersebut dan responden telah menerima kemungkiran tersebut dengan menyampaikan pembelaannya. Akibatnya, dengan pemakaian prinsip-prinsip kukuh yang menguasai undang-undang kontrak, perjanjian timbangtara tersebut dalam bentuk asalnya menjadi tamat.

**[2]** Telah berkisar dalam pemikiran responden satu kesilapan yang tulen berhubung dengan tujuan sebenar pemberhentian tersebut. Ianya dengan itu agak mustahil untuk menegaskan dengan yakinnya bahawa pihak-pihak tersebut adalah *ad idem* (menyetujui) ke atas isu kritikal ini, iaitu mengenai apakah yang harus dirujuk kepada penimbangtara. Akibatnya, penegasan perayu bahawa tindakan tersebut telah diberhentikan dengan persetujuan responden tidak dibenarkan.

**[3]** Pendekatan yang diterima pakai oleh Hakim perbicaraan adalah jelas salah. Bentuk fakta sepertimana yang telah dikemukakan di hadapan beliau memerlukan beliau menjalankan satu taksiran objektif berhubung surat-menyurat semasa yang telah dibentangkan dihadapan Mahkamah bagi tujuan menentukan samada pihak-pihak tersebut *ad idem* ke atas isu kritikal berhubung dengan sifat dan had pertikaian yang dirujukan kepada timbangtara (yang mana beliau telah gagal untuk melakukan). Hakim perbicaraan tersebut adalah juga salah ketika beliau tidak mempedulikan hal bahawa, jika, sepertimana yang ditegaskan oleh perayu, terdapatnya persetujuan atau kebenaran tulen oleh responden untuk meneruskan tindakan tersebut, peninggalan oleh peguamcaranya untuk menandatangani bersama notis adalah sesungguhnya tak relevan.

**[4]** Walaupun begitu, sungguhpun Hakim yang bijaksana telah tersalah arah akan dirinya sendiri mengenai undang-undang tatacara yang menguasai kehendak-kehendak rasmi untuk pemberhentian sesuatu tindakan, keputusan utamanya adalah betul. Mahkamah ini dengan itu bersetuju dengan keputusannya bahawa tindakan tersebut telah tidak diberhentikan dengan betul tetapi atas alasan yang berlainan, iaitu bahawa surat-menyurat semasa tidak mendedahkan satu perjanjian antara pihak-pihak tersebut mengenai samada rujukan kepada penimbangtara adalah termasuk tindakan dalam Mahkamah.

**[5]** Pada tarikh perayu memfailkan notis pemberhentiannya, lebih daripada 14 hari telah berlalu sejak responden menyampaikan pembelaannya kepada tindakan tersebut. Oleh itu, dengan mengambilkira A. 21 kk. 2(1) dan 3(1), perayu haruslah menyakinkan Mahkamah bahawa tindakan tersebut haruslah diteruskan.

**[6]** Perayu telah gagal untuk menunjukkan apa-apa kesilapan yang dilakukan oleh Hakim ketika beliau melaksanakan budibicaranya. Sebaliknya, Hakim yang bijaksana, ketika memutuskan samada untuk membenarkan pemberhentian, telah memikirkan kesemua fakta-fakta yang relevan dan keadaan-keadaan kes tersebut dan telah tidak membuat apa-apa kesilapan utama ketika membuat keputusan tersebut. Oleh kerana tidak berlakunya salah laksana keadilan terhadap perayu, rayuan haruslah ditolak.

*[Rayuan ditolak]*

**Cases referred to:**

*Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp Ltd. [1981] AC 909* ***(refd)***

*Doleman & Sons v. Osset Corporation [1912] 3 KB 257* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 21 rr. 2(1), 3(1)

*For the appellant - Karin Lim; M/s. Presgrave & Matthews*
*For the respondent - Mahinder Singh Dulku; M/s. Mahinder Singh Dulku & Co.*

## JUDGMENT

**Gopal Sri Ram JCA:**

We heard this appeal on 20 November 1995, and, at the conclusion of oral arguments, directed Counsel to put in written submissions. Our decision and the reasons therefor now follow.

The facts relevant to this appeal may be stated thus.

On 29 November 1991, the appellant entered into an agreement with the respondent under which the former agreed to construct 260 units of houses for the latter. As each phase of construction was completed, the appellant handed to the respondent certificates of completion of the particular phase. The respondent was to pay to the appellant the sum shown on the certificate.

According to the appellant, the respondent defaulted in making payment on three certificates, namely, certificates 5, 6 and 7. So, on 16 March 1993, it commenced proceedings in the High Court at Penang, claiming from the respondent a sum of RM285,474.30. The respondent entered an unconditional appearance and, on 12 April 1993, delivered its defence. The appellant, by a summons dated 17 June 1993, moved for summary judgment. That summons was never heard because, at some point in time after the summons was filed, the parties agreed that the dispute between them be referred to arbitration. But they could not agree on the arbitrator.

There then followed an exchange of correspondence between the appellant's solicitors and the President of the Persatuan Akitek Malaysia, or PAM, following which, on 1 October 1993, the parties appeared before the arbitrator appointed by PAM and obtained directions on the conduct of the arbitration.

After the commencement of arbitration proceedings, the appellant took steps to discontinue its action in Court. But it ran into difficulties.

There is some correspondence upon the matter and it is necessary for us to produce it in order to appreciate the arguments of Counsel and the decision reached by the learned Judge.

It begins with a letter dated 28 October 1993, from the appellant's solicitors to the respondent's solicitors which reads as follows:

Presgrave & Matthews
Advocates & Solicitors
Penang

28th October 1993

Messrs. Mahinder Singh Dulku & Co.
TG 3-5, Level 47
Komtar Tower
Penang

Dear Sirs

**Mahkamah Tinggi Pulau Pinang Guaman No. 22-91-1993 Wah Bee Construction Engineering lwn. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to the above matter and to the recent conversation between your Mr. Wong Yee Chue and our Miss Ooi Eng Choo wherein you have confirmed that you have no objection to our clients discontinuing the above matter with liberty to refile if our client so wishes with costs of RM700 to you.

We enclose herewith a copy of Notis Pemberhentian dated 28th October 1993 filed in Court by way of service on you. We will be forwarding you the cheque of RM700 upon receiving the same from our client.

Kindly acknowledge receipt of the above by signing and returning the duplicate of this letter to us.

Yours faithfully

Sgd.

On the same day as the date of the foregoing letter, the appellant's solicitors filed the notice of discontinuance of which the letter speaks.

They did so, of course, on the basis that the respondent's solicitors had consented to the discontinuance.

A day later, that is, on 29 October 1993, the appellant delivered its statement of case in the arbitration proceedings. That statement of case included the claim which formed the subject matter of the action in Court.

On 1 November 1993, however, the respondent's solicitors withdrew their consent to the discontinuance of the action. Their reasons for doing so appear in their letter which reads as follows:

Mahinder Singh Dulku, Ismadi & Co.
Advocates & Solicitors
Penang

1st November 1993

M/s. Presgrave & Matthews
Advocates & Solicitors
Standard Chartered Bank Chambers
2 Lebuh Pantai
10300 Penang

Dear Sirs,

**Re: Mahkamah Tinggi Pulau Pinang Guaman No. 22-91-1993 Wah Bee Construction Engineering lwn. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to your letter dated 28/10/1993 and are to advise that when we agreed to your discontinuing the above matter we did so under a misapprehension as we entirely forgot that there were arbitration proceedings already under way between your client as claimant and our client as respondent.

Secondly, you require leave of Court pursuant to O. 21 r. 3 as we have not signed your notice of withdrawal pursuant to O. 21 r. 2 (4) of the Rules of the High Court 1980.

In view of the above, we hereby categorically withdraw our consent to your withdrawal of action without leave of Court.

Yours faithfully,
Sgd.

It is clear from this letter that the respondent's solicitors were labouring under a mistake when they consented to the discontinuance of the suit during the telephonic conversation referred to in the letter of 28 October 1993. To their credit it must be said that they clarified their stand at the earliest possible moment.

Although the letter of 1 November 1993 does not expressly say so, it appears from the record provided that the respondent's solicitors were, at all material times, labouring under the impression that the arbitration related to other matters in dispute between parties and did not include the subject matter of the action in Court. In fairness to them, they quite rightly assumed that the appellant did

not wish to proceed with the subject matter of the action. Indeed, there is nothing in the contemporaneous correspondence to suggest that there was an agreement between the parties to refer **all** disputes between them to arbitration, including the subject matter of the action.

We pause to add that despite the presence of an arbitration clause in the relevant contract between the parties, the appellant proceeded to file its action in Court. At that stage, it was open to the respondent to have applied to stay the action pending reference to arbitration of the dispute that formed the subject matter of the suit. But it chose not to do so. Instead, it delivered its defence and thereby took a step in the action.

From the conduct of the parties, it is an inescapable conclusion that they were quite content to allow the Court to adjudicate upon the dispute. The agreement to arbitrate which the parties had earlier made had, accordingly, been substituted with an agreement to litigate.

Put in another fashion, the appellant had acted in breach of the arbitration agreement when it instituted the suit and the respondent accepted that breach by delivering its defence. In the result, by the application of well-established principles governing the law of contract, the arbitration agreement in its original form came to an end.

That an agreement to arbitrate is to be treated on no different footing from any other contract is beyond question was recognised by Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp. Ltd.* [1981] AC 909, 980, where he said:

> I would accept that the unperformed primary obligations of the parties under an arbitration agreement, like other contracts, may be brought to an end by frustration, or at the election of one party where there has been a repudiatory breach of that agreement by the other party.

In the present case, by reason of all that had transpired between the parties, what was required was a fresh agreement to arbitrate. And it is here that the confusion arose.

The appellant was under the impression that what was to be referred to arbitration were all disputes between the parties. The respondent, on the other hand, thought that the reference was to exclude the subject matter of the litigation.

In this state of affairs, it was open to the appellant, at that stage of the proceedings, to have applied to the Court at once for leave to discontinue the action and for any other consequential directions. But the appellant chose not to do so. Instead, its solicitors persisted in their chosen course. This is reflected in the subsequent exchange of correspondence between the parties which we now reproduce below:

Presgrave & Matthews
Advocates & Solicitors
Penang

1st November 1993

Messrs. Mahinder Singh Dulku & Co.
TG 3-5, Level 47
Komtar Tower
Penang

Dear Sirs

**Mahkamah Tinggi Pulau Pinang Guaman No. 22-91-1993 Wah Bee Construction Engineering lwn. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to the above matter and enclose herewith the Standard Chartered Bank cheque No. 105558 for the sum of RM700 being the costs paid by our client to you.

Kindly acknowledge receipt of the above by signing and returning the duplicate of this letter to us.

Yours faithfully
Sgd.

Mahinder Singh Dulku, Ismadi & Co.
Advocates & Solicitors
Penang

2nd November, 1993

M/s. Presgrave & Matthews
Advocates & Solicitors
Standard Chartered Bank Chambers
2 Lebuh Pantai
10300 Penang

Dear Sirs,

**Re: Mahkamah Tinggi Pulau Pinang Guaman No: 22-91-1993 Wah Bee Construction Engineering lwn. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to your letter dated 1-11-1993 and return herewith your Standard Chartered Bank cheque No: 105558 for the sum of RM700 on the grounds stated in our letter to you dated 1-11-1993.

Yours faithfully,
Sgd.

Presgrave & Matthews
Advocates & Solicitors
Penang

2nd November 1993

Messrs. Mahinder Singh Dulku & Co.
TG 3-5, Level 47
Komtar Tower
Penang

Dear Sirs

**Mahkamah Tinggi Pulau Pinang Guaman No. 22-91-1993 Wah Bee Construction Engineering lwn. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to the above matter and to your fax of 1st November 1993.

Kindly note that as you and your client have consented to our client withdrawing the abovementioned case, no leave of Court is necessary. The consent of withdrawal was confirmed by us *vide* our letter of 28th October 1993 to your goodself.

As the acceptance of the withdrawal by your client has been communicated to our client and the Notice of Discontinuance duly filed, your clients are not entitled to revoke the said acceptance.

In this respect, kindly refer to s. 5(2) of the Contracts Act. Therefore, whether your client signs the notice of withdrawal or not is irrelevant as in our Notice of Discontinuance, we have informed the Court that the defendant has agreed to the withdrawal and we do not see any need for your client to sign the said withdrawal.

In the premises, we categorically state that you are not entitled to withdraw the consent as the notice of withdrawal has been filed by us in Court and your client's consent has been expressly provided in the said Notice of Discontinuance. Therefore, you are not entitled to withdraw the consent as the proceedings have wholly been discontinued and that your client cannot blow hot and cold and our client will hold your client liable for any consequences suffered.

Yours faithfully
Sgd

The appellant's solicitors wrote even dated letters to the High Court at Penang contending that the action had been properly discontinued. It is unclear what the appellant hoped to achieve by this. But it succeeded in producing the following reaction from the respondent's solicitors:

Mahinder Singh Dulku Ismadi & Co.
Advocates & Solicitors
Penang

4th November, 1993

M/s. Presgrave & Matthews
Advocates & Solicitors
Standard Chartered Bank Chambers
2 Lebuh Pantai
10300 Penang

Dear Sirs,

**Re: Penang High Court Civil Suit No. 22-91-1993 Wah Bee Construction Engineering lwn. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to your two (2) letters both dated 2nd November, 1993 addressed to the Senior Assistant Registrar of the Penang High Court and to us respectively.

We stand by the contents of our letter dated 1/11/1993. Order 21 r. 2(4) of the Rules of the High Court, 1980 is clear and unequivocal.

Therefore kindly make an application to Court for leave if you wish to withdraw the above-mentioned action.

Yours faithfully,
Sgd.

The rest of the correspondence between the solicitors for the parties is as follows:

Presgrave & Matthews
Advocates & Solicitors
Penang

6th November 1993

Messrs. Mahinder Singh Dulku & Co.
TG 3-5, Level 47
Komtar Tower
Penang

Dear Sirs

**Mahkamah Tinggi Pulau Pinang Guaman No. 22-91-1993 Wah Bee Construction Engineering lwn. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to the above matter and to your letter of 4th November 1993.

We confirm our stand as per our last fax to you as the matter is withdrawn there is no necessity to apply for leave as you have consented to the same.

Yours faithfully
Sgd

Presgrave & Matthews
Advocates & Solicitors
Penang

8th November 1993

Messrs. Mahinder Singh Dulku & Co.
TG 3-5, Level 47
Komtar Tower
Penang

Dear Sirs

**Mahkamah Tinggi Pulau Pinang Guaman No. 22-91-1993 Wah Bee Construction Engineering lwn. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to the above matter and to your letter of 2nd November 1993.

We have been instructed by our clients to forward you our Standard Chartered Bank cheque No. 105558 for the sum of RM700 being the costs paid by our client.

Kindly acknowledge receipt of the above by signing and returning the duplicate of this letter to us.

Yours faithfully
Sgd

Mahinder Singh Dulku, Ismadi & Co.
Advocates & Solicitors
Penang

10th November 1993

M/s. Presgrave & Matthews
Advocates & Solicitors
Standard Chartered Bank Chambers
2 Lebuh Pantai
10300 Penang

Dear Sirs

**Re: Penang High Court No: 1 Civil Suit No: 22-91-1993 Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to your letter dated 8-11-1993 and return herewith your Standard Chartered Bank cheque No: 105558 for the sum of RM700 on the grounds stated in our letters to you dated 1-1 1-1993 and 4-11-1993.

Yours faithfully
Sgd

Presgrave & Matthews
Advocates & Solicitors
Penang

15th November 1993

M/s. Mahinder Singh Dulku Ismadi & Co.
Advocates & Solicitors
TG 3-5, Level 47
Komtar Tower
10000 Penang

Dear Sirs,

**Penang High Court Civil Suit No. 22-91-1993 Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn. Bhd.**

We refer to the above matter and your letter of 10.11.93.

Please be informed that the sum of RM700 cost to your client *vide* SCB cheque No. 105558 is in our possession.

Whether you accept or not, we still consider the matter to be duly settled with your consent.

Yours faithfully
Sgd.

The controversy as to whether the suit had been properly withdrawn produced some difficulty for the appellant. To recall, the appellant had, on the assumption that the suit had been properly discontinued with the respondent's consent, delivered its pleading in the arbitration, including in it the claim which formed the subject matter of the action. However, in view of the respondent's objection contention that the suit was still on foot, it was not open to the arbitrator to deal with so much of the claim as lay in Court.

The principle that governs the appellant's case is well-settled. It was expressed by Fletcher Moulton LJ in the following passage in his judgment in *Doleman & Sons v. Ossett Corporation* [1912] 3 KB 257, 268:

> The present position, therefore, of agreements to refer to private tribunals may be shortly expressed thus. The law will not enforce the specific performance of such agreements, but, if duly appealed to, it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a Court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action, or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence, is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with

> the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction. Therefore to hold that the private tribunal is still effective after the dispute has come before the Court would be to say that, in all cases in which s. 4 of the Arbitration Act, 1889, applies, the defendant may still force on an arbitration and, by obtaining an award from the arbitrators, oust the jurisdiction of the Courts to decide the question they have in hand. In each case where the Court has decided that it will retain in its own hands the decision of the case, there would thus be a race between it and a private tribunal which should be the first to give a decision in the matter. The learned Judge has decided that, if during the pendency of the action an award is obtained from the arbitrator, it can be pleaded in bar to the action, or, in other words, the decision of the arbitrator, and not that of the Court, decides the rights of the parties. If this were good law, there would in every case be the race between the public and private tribunals which I have described, and the decision of the speediest would prevail. This would be ousting the jurisdiction of the Court in a most ignominious way.

Thus, in the present case, for so long as the question remained unsettled as to whether the appellant had properly withdrawn its suit, or whether that suit was still seised of by the Court, the arbitrator would be powerless to make any adjudication upon so much of the claim before him as was also before the Court. The appellant had therefore been impaled upon the horns of a dilemma. It could not prosecute its suit because of its contention that the same had been withdrawn: neither could it persuade the arbitrator to adjudicate upon the subject matter of the claim in Court for he was, on high authority, precluded from doing so. This impasse had to be broken. And the only way in which this could be done was by an approach to the Court.

Accordingly, on 11 April 1994, the appellant filed a notice of motion in the High Court asking for a declaration that the suit it had earlier commenced had been discontinued or, alternatively, for leave to discontinue it. The application raised two questions.

First, whether the appellant's suit had been properly discontinued; second, if the suit had not been discontinued, then, whether discretion ought to be exercised in the appellant's favour and leave granted to discontinue. The learned Judge who heard the application answered both questions in the negative and dismissed the appellant's motion. It is against this order that the present appeal is directed.

Cik Karin Lim of Counsel for the appellant has argued that the Judge was wrong in holding that the suit had not been properly discontinued. She relies on the respondent's consent which preceded the filing of the notice. The fact

that the notice of discontinuance was not also signed by solicitors for the respondent is, she argues, a mere irregularity which did not invalidate the act of discontinuance.

With respect, we are unable to agree with submissions of Counsel.

As observed earlier, there was, operating upon the minds of the respondent's solicitors a genuine mistake as to the real purport of the discontinuance. They were under the impression that the discontinuance of the suit was an abandonment by the appellant of its claim in Court. The appellant, on the other hand assumed that the purpose of the discontinuance was to refer **all** disputes to arbitration, including the action in Court. In these circumstances, it is quite impossible to assert with any confidence that the parties were *ad idem* upon the critical issue, i.e., the precise nature of the dispute that was to be referred to the arbitrator. Consequently, the appellant's contention that the action had been discontinued with the respondent's consent is unsustainable and we unhesitatingly reject it.

The learned Judge, in his judgment, refused to enter upon this question on the ground that it would involve his deciding which of the two solicitors was speaking the truth on the issue of consent. He therefore chose to decide the application before him upon the basis of the appellant's failure to observe, what he considered to be, the formal requirements of a notice of discontinuance.

In our judgment the approach adopted by the learned Judge was clearly wrong for two reasons. First, the fact pattern that presented itself before him, and the issues which the application before him raised, did not require him to perform the task which he apprehended as being his. All that was required of him was to carry out an objective assessment of the contemporaneous correspondence that was placed before the Court for the purpose of ascertaining whether the parties were *ad idem* upon the critical issue as to the nature and extent of the dispute that was being referred to arbitration.

Second, it would appear that the learned Judge completely overlooked the crucial point in the case. It is this. If, as contended by the appellant, there was genuine consent by the respondent to the action being discontinued, the omission by its solicitors to co-sign the relevant notice was completely irrelevant. For there is no dispute whatsoever upon the proposition that an action may be properly withdrawn by consent given informally.

We are therefore in agreement with Counsel for the appellant that the learned Judge misdirected himself upon the adjectival law that governed the formal requirements for the discontinuance of an action.

But that is not the end of the matter. For apart from dissenting from the Judge upon his reasons for deciding the first issue against the appellant, we are entirely satisfied that his ultimate decision was correct. We therefore agree with his

conclusion that the action had not been properly discontinued. However, we do so, on the ground that the contemporaneous correspondence does not disclose an agreement between the parties as to whether the reference to the arbitrator included the action in Court.

With that we now turn to consider the second question, namely, whether the learned Judge was correct in exercising his discretion against the appellant and in refusing it leave to withdraw its action.

The relevant rule of Court that governs the withdrawal and discontinuance of proceedings is O. 21 of the Rules of the High Court 1980, r. 2(1) and r. 3(1) of which read as follows:

> 2(1) The plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.
>
> 3(1) Except as provided by r. 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing application for the grant of such leave may order the action or counterclaim to be discontinued, any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as costs the bringing of a subsequent action or otherwise as it thinks just.

It is not in dispute that at the date on which the appellant filed its Notice of Discontinuance, more than 14 days had lapsed since the respondent's delivery of its defence to the action. The appellant had, therefore, under the terms of the rules above-quoted, to satisfy the Court that the action ought to be discontinued.

We must say at once that the Rules of Court confer upon the High Court a wide discretion upon the question whether an action should be discontinued. The rules also confer upon the Court a wide power in relation to the kind of orders it may make upon an application for leave.

Now, it is settled law that in an appeal against the exercise of discretion by a Judge, the initial function of this Court is one of review only, there being no original discretion vested in this Court. Only after an appellant is able to demonstrate to a conviction that his case comes within one or more of those categories of cases in which appellate interference is warranted does this Court become entitled to exercise a discretion of its own.

In the present case, the Judge, when deciding whether to permit discontinuance, applied his mind to all the relevant facts and circumstances of the case. He also properly directed himself upon the principles of law that were applicable to the case before him. After weighing all relevant considerations, he came to the conclusion that leave ought not to be granted.

In our judgment, the appellant has singularly failed to demonstrate any error on the part of the Judge when he came to exercise his discretion. Indeed, we are satisfied that the learned Judge exercised his discretion correctly and did not take into account any irrelevant consideration or omit any relevant consideration, or make any error of principle when making his decision. Further, we are also satisfied that no miscarriage of justice has been occasioned by his refusal to permit discontinuance.

The appellant is not prejudiced in any fashion whatsoever. It has lost nothing. It has proceeded with the arbitration and the arbitrator may adjudicate upon all its claims against the respondent, save that which forms the subject matter of the action. It has a summons for judgment on file in the action which it invited the Judge to fix for hearing after he had refused leave to discontinue. All rights that have accrued to it in the suit are therefore preserved and no miscarriage of justice has been occasioned to the appellant.

For the reasons given, the appeal is dismissed with costs. All orders made by the Judge in the Court below are hereby affirmed. The deposit paid into Court will be paid out to the respondent to account of its taxed costs.

Reported by W.A. Sharif